IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6546 OF 2003

Ashokkumar Sureshkumar Mehta ...Petitioner

Versus

Nikhil Mahendra Kothari & Ors. ...Respondents

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Mr. J.B. Kocheta, counsel for Petitioner

Mr. R.D. Dave i/b M/s. N.N. Vaishanav & Co. counsel for Respondent No.1.

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CORAM: B. H. MARLAPALLE, J.

DATED: 15TH MARCH, 2005

P. C.:-

1. Heard Mr. Kocheta the learned counsel for the petitioner and Mr. Dave h/f M/s. N.N. Vaishnav and Co. for the respondent No.1.

2. The respondent No.1 instituted a Special Summary Suit No.3 of 2002 under Order XXXVII of C.P.C. before the learned Civil Judge, Senior Division at Malegaon and the present petitioner was impleaded as defendant No.3 whereas the respondent Nos. 2 and 3 were impleaded as defendant Nos. 1 and 2. The suit was for the recovery of the amount of Rs.1,77,705/-. The present petitioner filed an application under Order XXXVII Rule 3(5) of C.P.C. praying for leave

to defend unconditionally and this application was filed before filing the written statement and it was supported by a cryptic affidavit. The application was opposed by the plaintiff by filing a detailed say at Exh.55. By the impugned order dt. 1.8.2003 the learned Civil Judge, Senior Division at Malegaon was pleased to permit the defendant No.3 to defend the suit subject to furnishing the Bank Guarantee to the extent of the claim, within one month.

3. Mr. Kocheta, the learned counsel for the petitioner submitted that the reliance of the trial court on the decision of this Court in the case of Indian Reyon and Industries Ltd. Vs. M/s. Sirohya Enterprises (AIR 1992 Bom. 60) is not the correct position in law in view of the subsequent decision of the Supreme Court in the case of Sunil Enterprises and Anr. Vs. SBI COmmercial & International Bank Ltd. [(1998) 5 SCC 354]. The trial Court in para 5 of the impugned order though noted that there was a triable issue, prima facie, documents went to show that the present petitioner had forwarded payments to the plaintiff through purchasers i.e. defendant Nos. 1 and 2 and even the despatches were routed through the present petitioner. The trial court therefore, held that the defence of the petitioner was not of substantial nature. The learned counsel for the petitioner also referred to the decision in the case

of **Santosh Kumar Vs. Bhai Mool Singh (AIR 1958 SC 321).** In the case of Sunil Enterprises (Supra), the law laid down in the case of Santosh Kumar (supra), **Milkhiram (India) Pvt. Ltd. V/s. Chamanlal Bros (AIR 1965 SC 1698) and Mechelec Engineers & Manufacturers V/s Basic Equipment Corporations (AIR 1977 SC 577)** was referred to and the propositions laid down in the said decision came to be summed up as follows:-

(a) If the defendant satisfies the court that he has a good defence to the claim on merits, the defendant is entitled to unconditional leave to defend.

(b) If the defendant raises triable issue indicating that he has a fair or bona fide or reasonable defence, although not a possible good defence,the defendant is entitled to unconditional leave to defend.

(c) If the defendant discloses such facts as may be deemed sufficient to entitle him to defend, that is, if the affidavit discloses that at the trial he may be able to establish a defence to the plaintiff’s claim, the court may impose conditions at the time of granting leave

to defend - the conditions being as to time of trial or mode of trial but not as to payment into court or furnishing security.

(d) If the defendant has no defence, or if the defence is sham or illusory or practically moonshine, the defendant is not entitled to leave to defend.

(e) If the defendant has no defence or the defence is illusory or sham or practically moonshine, the court may show mercy to the defendant by enabling him to try to prove a defence but at the same time protect the plaintiff imposing the condition that the amount claimed should be paid into court or otherwise secured.

4. Having regards to the observations made by the trial court on the basis of the documents filed below Exh.57 and by taking into considerations the guide-lines laid down by the Supreme Court in the case of Sunil Enterprises (supra), it cannot be said that the view taken by the trial court is perverse or manifestly erroneous. It is a possible view on the basis of the averments made in the plaint and the documents filed below Exh.57 alongwith the plaint.

No interference is therefore called for in this petition under Article 227 of the Constitution of India, though the learned counsel for the petitioner referred to the provisions of Section 230 of the Indian Contract Act.

5. Hence, the petition is rejected summarily. Ad interim order, if any, stands vacated.